

STATE OF MICHIGAN
IN THE SUPREME COURT

ESTATE OF DANIEL CAMERON, by
DIANE CAMERON & JAMES CAMERON,
Co-GUARDIANS,

Supreme Court Case No. 127018

Plaintiff/Appellant.

Court of Appeals Case No. 248315

v

Washtenaw County Circuit Court
Case No.02-549-NF

AUTO CLUB INSURANCE ASSOCIATION,

Defendant/Appellee.

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE
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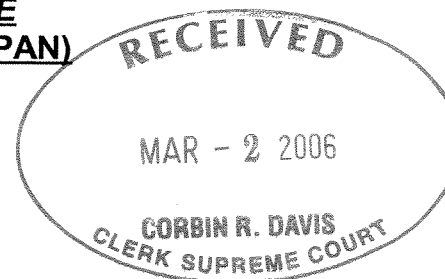


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CONCURRING STATEMENT OF QUESTION INVOLVED

Amicus Curiae CPAN concurs with the Statement of Question Involved as set forth by Plaintiff-Appellant, Estate of Daniel Cameron, in its Supplemental Brief on Appeal.

INTRODUCTION

This Court has requested supplemental briefing as to the relationship between Section 5851(1) of the Revised Judicature Act, e.g. the minor and insane persons' tolling provision, and the one year back rule contained within Section 3145(1) of the No-Fault Act. At the outset, it should be noted that the one year back rule is one sentence contained within a broader subsection creating notice and time requirements for no-fault benefits claims. As such, it must be read in its context to determine its relationship, and that of Section 3145(1) as a whole, to the minor and insane persons tolling provisions in Section 5851(1). To do otherwise would be to ignore well-established principles of statutory construction which caution us not to divorce words and clauses from those surrounding them. See generally, *Sanchick v State Board of Optometry*, 342 Mich 555 (1955).

Even more importantly, in determining the relationship between two statutes, it is important not only to read them *in pari materia* so as to give effect to the legislative purpose underlying both of them – and not one to the exclusion of the other statute's goals. And finally, it is essential in matters of statutory interpretation to not lose sight of the fact that statutes themselves may not run afoul of well-established common law doctrines, where equity requires that such doctrines be applied. In the case at bar, the one year back rule cannot be interpreted to bar the claims of minors and mentally incompetent persons, because such a prescription on the right to recover benefits would contravene the common law doctrine of *contra non valentem* which has been accepted in Michigan as standing for the proposition that no prescription may run against a person unable to act (or bring an action). Black's Law Dictionary, 8th Edition; *Kalakay v Farmers Ins Group*, 120 Mich App 623 (1982); *Lemmerman v Fealk*, 449 Mich 56, 80 (1995) (J. Weaver concurring).

ARGUMENT

I. THE REVISED JUDICATURE ACT'S TOLLING PROVISION FOR MINORS AND INSANE PERSONS, MCL 600.5851(1), MUST BE APPLIED TO SECTION 3145(1) OF THE NO-FAULT ACT, INCLUDING THE ONE YEAR BACK RULE PROVISION, IF THE STATUTES ARE TO BE READ *IN PARI MATERIA* SO AS TO GIVE EFFECT TO THE LEGISLATIVE PURPOSE BEHIND SECTION 5851(1)

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515 (1998). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411 (1999).

Section 3145(1) of the No-Fault Act reads in full as follows:

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than one year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within one year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within one year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced. The notice of injury required by this section may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added]. (MCL 500.3145(1)).

As such, Section 3145(1) sets forth both notice and time requirements on a lawsuit to recover no-fault personal protection insurance (PIP) benefits. It also provides claimants

with a specified time frame, e.g., one year from an identifiable event to comply with them. As such, it is a comprehensive statute of limitations on no-fault PIP actions. In one fell swoop, Section 3145(1) provides one year time limitations on providing notice of the claim, filing a lawsuit to enforce the claim, and recovering unpaid benefits as part of that claim.

Section 5851(1) of the Revised Judicature Act meanwhile states in full the following:

Except as otherwise provided in subsections (7) and (8), if the person entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852. (MCL 600.585(1)).

Clearly, it is, as this Court has aptly described it in the February 2, 2006 order for supplemental briefing, a “tolling provision”. As such, it extends the “period” of limitations whenever the injured person is a minor or suffers from a mentally incapacitating disability

Section 3145(1) of the No-Fault Act, when read as a whole, and not subdivided, is just as clearly a statute of limitations. Black’s Law Dictionary, 7th Ed, defines the term “statute of limitations” in pertinent part as the following:

A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declarations that no suit shall be maintained on such caused of action, nor any criminal charge made, unless brought within a specified period of time after the right accrued. Statutes of limitations are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced.

To the extent, however, it may be argued that the one year back rule provision contained in Section 3145(1) of the No-Fault Act is not, by itself, a statute of limitations, rules of

statutory, as well as grammatical, construction caution against singling out one provision in a much larger section, subsection, or paragraph, and then reading it outside of its context. In seeking meaning, the words and clauses in a statute are not divorced from those which precede and those which follow. See generally, *Sanchick*, supra.

Moreover, the one year back rule begins with a conjunction, the word “however, and accordingly, it should be read together with the words preceding it in the same paragraph. The word “however” is generally to be avoided when starting a sentence, when its meaning, as in this case, is “nevertheless”. *Strunk and White*, *The Elements of Style*, 3rd Ed, p 48. Nevertheless is commonly defined as “in spite of what has been said.” *Random House American Dictionary*, New Revised Edition (1990). Thus, if the word, “however”, as used in Section 3145(1) of the No-Fault Act, creates a “one year back rule”, it does so “in spite of what has been said” in the sentences immediately preceding it in the same subsection. In other words, those other immediately preceding sentences cannot be ignored when it comes to deciding whether Section 3145(1) of the No-Fault Act is a statute of limitations, subject to tolling under Section 5851(1) of the Revised Judicature Act.

As this Court has also recognized in the past, statutes relating to the same subject or sharing a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417 (1998). Clearly, Section 5851(1) of the Revised Judicature Act and Section 3145(1) of the No-Fault Act must be read *in pari materia* to give proper effect to the Legislature’s intent in enacting them. If Section 3145(1) of the No-Fault Act provides some form of statute of limitations, which it clearly does,

regardless of how one labels the one year back rule, Section 5851(1) addresses the same subject, statutes of limitation, by creating a specific exception to their application.

Recently, this Court addressed the need to read tolling provisions in the Revised Judicature Act *in pari materia* with statutes of limitations on bringing such actions. In *Waltz v Wyse*, 469 Mich 642 (2004), this Court rejected the plaintiff's contention that the medical malpractice notice tolling provisions contained in Section 5856(d) of the Revised Judicature Act must be applied to the wrongful death savings provisions in Section 5852 of the same act because the wrongful death savings provision clearly was not a statute of limitations on medical malpractice actions, but rather a mere savings provision. Thus, presumably, if the issue, as in this case, had involved whether a tolling provision applied to an actual statute of limitations – this Court would have then read the statutes together *in pari materia*.

In this instance, Section 3145(1) of the No-Fault Act, including the one year back rule included is clearly a statute of limitations. As such, it must be read *in pari materia* with the minor and insane persons tolling provision in Section 5851(1) of the Revised Judicature Act. Stated otherwise, the one year back rule, as part of Section 3145(1) of the No-Fault Act, must be tolled by operation of Section 5851(1) of the Revised Judicature Act in its same manner as the notice provisions for timely filing a claim and the time limitations on filing a lawsuit contained in the same section must be tolled, if the two statutes are to be read together *in pari materia*.

Statutes “must be construed sensibly and in harmony with the legislative purpose.” *Adams v Auto Club Ins Ass’n*, 154 Mich App 186, 195 (1986), quoting *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508 (1981). The legislative purpose behind Section 3145(1) is to provide timely notice of claims and to prevent against stale claims.

Section 5851(1) of the Revised Judicature Act is designed to protect minors and mentally incompetent persons because they are unable to protect themselves by filing notice of bringing an action in a timely fashion. Applying such tolling to Section 3145(1) of the No-Fault Act in its entirety, which means the one year back rule included, is the only way to read the two statutes *in pari materia* so as to construe them sensibly and in a fashion that remains consistent with the purposes underlying both of them. In contrast, separating out the one year back rule from its context, and applying tolling only to part of Section 3145(1) of the No-Fault Act would render meaningless the protections set forth in Section 5851(1) of the Revised Judicature Act. Accordingly, the two statutes should instead be read harmoniously so that tolling continues to protect minors and mentally incompetent persons.

II. EVEN IF THE RESULT IN CAMERON IS CORRECT, THE ONE YEAR BACK RULE CANNOT RUN AGAINST A MINOR OR MENTALLY INCOMPETENT PERSON UNDER THE COMMON LAW DOCTRINE OF CONTRA NON VALENTEM BECAUSE “NO PRESCRIPTION MAY RUN AGAINST A PERSON WHO IS UNABLE TO BRING AN ACTION” AND THE ONE YEAR BACK RULE PRESCRIBES A TIME FRAME DURING WHICH A CLAIMANT MUST FILE A LAWSUIT IN ORDER TO BE ABLE TO RECOVER FULL NO-FAULT BENEFITS

Even if the Court of Appeals reached the correct holding in this case when it found that the minor and insane persons tolling provision in Section 5851(1) of the Revised Judicature Act does not halt operation of the one year back rule, the result should still be vacated because such an application of the one year back rule clearly violates the common law doctrine of *contra non valentem*, which simply provides that “no prescription may run against a person who is unable to bring an action.” Black’s Law Dictionary, 4th Edition. Without question, minors and mentally incompetent persons are unable to bring an action. As a result, the one year back rule is clearly a prescription on the right of an injured person to recover his or her full entitlement of no-fault benefits after being injured.

Black's Law Dictionary, 8th Edition, defines the term "prescription" quite succinctly as "[t]he effect of the lapse of time in creating and destroying rights." Thus, the one year back rule is a prescription as that term is used in common law because it limits recovery of expenses incurred more than one year before the date the lawsuit was filed. While a typical statute of limitation, e.g. one which requires a lawsuit be filed within a certain period, is by its nature also a form of prescription, so is a limitation on recovering damages, or as in this case, benefits, if no lawsuit is filed within a certain time period, such as the one year back rule as set forth in middle of Section 3145(1) of the No-Fault Act.

Recently, in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005), this Court rejected what arguably could be viewed as a "contra non valentem" argument by the plaintiffs in seeking "equitable tolling" of the one year back rule. However, this Court's ruling in *Devillers* is not on point here because, unlike *Devillers*, this lawsuit involves a no-fault PIP benefits claim brought by a minor, who was also rendered mentally incompetent by his injuries in the underlying motor vehicle collision. Thus, while the plaintiff in *Devillers* could have easily brought an action earlier than he did, and thus, avoided the one year back rule, a minor or a mentally incompetent person, such as in this case, is unable to file such an action because of either age or incompetence, or both.

The appellate courts in Michigan have previously recognized the existence of the common law doctrine of contra non valentem, which is also sometimes called more fully "*contra non valentem agere nulla currit praescriptio*." This longer term is also consistently defined as being the rule that "a prescription may not run against a person unable to act (or bring an action)." Black's Law Dictionary, 8th Edition. Prescriptions clearly include statutes of limitations, but are also broader in scope and more all encompassing, because

a prescription can be anything that affects one's rights, not just the right to bring an action. See generally, Black's Law Dictionary, 8th Edition.

In *Kalakay*, supra, the Court of Appeal's entertained an argument that the common law equitable doctrine of *contra non valentem* should be applied where he had mistakenly sued the wrong no-fault insurance carrier seeking no-fault PIP benefits. But, the Court found the claim barred by the one year back rule. Of course, the plaintiff in *Kalakay* was neither a minor nor a mentally incompetent person, and thus, could not properly be viewed by the court as a person unable to bring an action. Clearly, the plaintiff in *Kalakay* could have brought an action, and he did, in a timely fashion, but he mistakenly sued the wrong no-fault insurer.

Similarly, Justice Weaver in her concurring opinion in *Lemmerman*, supra, recognized the common law doctrine of *contra non valentem* when she stated, before rejecting the repressed memory theory as a basis for applying the discovery rule in childhood sexual abuse cases, the following:

The doctrine of *contra non valentem agere nulla currit prescriptio*, an exception to the prescription rules, tolls the prescriptive period when a party is unable to exercise his cause of action when it accrues. Limitations of Actions, 54 CJS, §86, p 122. The doctrine recognizes certain situations in which the prescriptive period is prevented from running, including where the cause of action is not known or reasonably knowable by the plaintiff. Id. *Larson v Johns-Manville Corp*, 427 Mich 301; 399 NW2d 1 (1986).

It is important to note that in *Kalakay*, the Court of Appeals evidently agreed that the one year back rule is a prescription, even if it is arguably not a typical statute of limitations, the Court simply refused to find in that case that the plaintiff was unable to bring the action.

Without question, the circumstances in the case at bar are very different than those presented in the *Kalakay* case because, in this instance, the point is that the Plaintiff is a minor, as well as a mentally incompetent person, who clearly is not able to bring a lawsuit to protect his interests. Thus, the doctrine of *contra non valentem* must be applied to toll the one year back rule as a prescription on the plaintiff's right to recover his full benefits. Any other result would be both devastating and unfair to minors and brain injured persons.

CONCLUSION AND RELIEF REQUESTED

This Court has raised an interesting legal question in requesting supplemental briefing on appeal. It is a question of statutory interpretation, but it also raises fundamental concerns as to the application of common law equitable doctrines in Michigan. In particular, it raises important questions as to how we treat those unable to protect themselves, such as minors and mentally incompetent persons, in our civil justice system. In sum, the one year back rule under the no-fault law is part of a much larger statute of limitations provision, which is set forth in Section 3145(1) of the No-Fault Act.

Like typical statutes of limitation, the one year back rule has a temporal element which runs until a lawsuit is commenced. It is different from a typical statute of limitations in that it alone does not bar an action completely, but rather it limits the benefits the plaintiff is entitled to recover in the lawsuit. Notwithstanding this fact, it is still obviously part of a much larger statutory subsection, which clearly does include more traditional notions of what is a statute of limitations. As such, the one year back rule should be read in its context and not as an isolated provision affecting the right to recover no-fault benefits. Effectively, it is a statute of limitations, or at the very least, it is a central element of a larger statute of limitations, which is set forth in Section 3145(1) of the No-Fault Act as a whole.

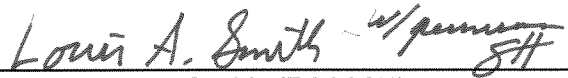
Section 5158 of the Revised Judicature Act is easier to understand than Section 3145(1) of the No-Fault Act – it clearly is a tolling provision which allows minors and mentally incompetent persons to file a lawsuit even after the statute of limitations has run. If Section 3145(1) of the No-Fault Act and Section 5851(1) of the Revised Judicature Act are to be read *in pari materia*, the tolling provision must be applied to the one year back rule. Otherwise, the clear purposes behind Section 5851(1) of the Revised Judicature Act would be completely negated. To read it in any other fashion would deny minors and brain injured persons its protection simply because they had happened to be in an auto accident.

Even if this Court does not accept that the one year back rule, as part of Section 3145(1) of the No-Fault Act, operates as one component of a larger statute of limitations, this Court must nonetheless reverse the Court of Appeals' ruling in this case, because it clearly runs afoul of the common law doctrine of *contra non valentem*. The one year back rule, even if not a statute of limitations, is clearly a prescription on the plaintiff's ability to recover no-fault benefits. Under the doctrine of *contra non valentem*, no prescription may run against a person unable to bring an action. Minors and brain injured persons are clearly persons who are unable to get to the courthouse and bring an action. Accordingly, this equitable doctrine must be applied, even if the one year back rules applies in this situation.

WHEREFORE, *Amicus Curiae* CPAN respectfully requests this Honorable Court reverse the Court of Appeals and instead, reinstate the decision by the trial court.

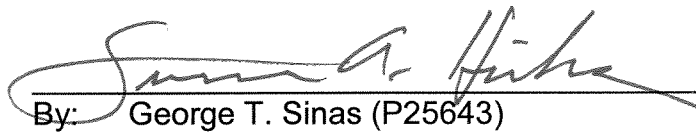
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